FILE COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1944

No. 446

AMBASSADOR, INC., WASHINGTON-ANNAPOLIS HOTEL COMPANY, DAVID A. BAER and ROBERT O. SCHOLZ, a Partnership, *et al.*, *Appellants*,

v.

UNITED STATES OF AMERICA, AMERICAN TELEPHONE & TELEGRAPH COMPANY, *et al.*

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA

REPLY BRIEF FOR APPELLANTS

PARKER MCCOLLESTER,
GEORGE DEFOREST LORD,
JOSEPH W. WYATT,
Attorneys for Appellants.

March 8, 1945.

INDEX

Cases Cited

IN THE

Supreme Court of the United States

OCTOBER TERM, 1944

No. 446

AMBASSADOR, INC., WASHINGTON-ANNAPOLIS HOTEL COMPANY, DAVID A. BAER and ROBERT O. SCHOLZ, a Partnership, *et al.*, *Appellants*,

v.

UNITED STATES OF AMERICA, AMERICAN TELEPHONE & TELEGRAPH COMPANY, *et al.*

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA

REPLY BRIEF FOR APPELLANTS

I

As to the Facts

The briefs for both the Government and the telephone company* accept generally the statements of fact contained in the main brief for the hotels. There is no dispute concerning what may be called the physical facts. The controversy is as to the inferences to be drawn therefrom and then as to their legal effect. Counsel for the telephone

* In this reply brief, as in appellants' main brief, the American Telephone & Telegraph Company and the Chesapeake and Potomac Telephone Company will be referred to collectively as "the telephone company." Figures in straight type refer to the Government's brief and figures in italics to the brief for the telephone company.

company, however, take exception (*Br. 3*) to our reference to the hotels as "procuring" equipment from the telephone company and "furnishing" telephone facilities so procured to their guests. It is asserted for the telephone company that its equipment "is not rented to the hotels" and that "what the company furnishes and charges for is telephone service". Of course, we did not mean to imply that the hotels furnish the physical telephone instruments to their guests to take away with them, as distinguished from the convenience and accessibility to the telephone company's service which the telephone instruments, the PBX board and the internal wiring in the hotel make possible. Whether it is proper to say that the hotels "procure" the facilities from the telephone company is a matter of words rather than substance. The hotels, as part of the installations which guests expect in a modern hostelry, cause telephone instruments to be installed in their rooms and connected with the PBX boards which they obtain and operate. The hotels could procure such equipment elsewhere except for the regulation of the telephone company (R. 132) by which it refuses to make connection with equipment not obtained from it. Monthly charges are paid for the equipment. Certainly, despite the telephone company's plea that their monopoly equipment charges are for service, the transaction involved in obtaining equipment, has all the characteristics of rental. It is not the telephone company's choice whether any equipment is installed in a hotel, or how much. The equipment is ordered by the hotel. The telephone company does not come into the hotel to operate it. It is operated by employees of the hotels. The equipment may be used entirely for intra-hotel communication without any contact with the telephone company, and whether it is used at all for outside communication depends upon the will of the hotel. Moreover, even if the equipment is "furnished" and not "rented" to the hotels, this does not make what transpires within the hotels "service" by the telephone company. There can be no "service" without operators, and these are employed and directed by the hotels.

II

Reply to the Arguments of the Government and the Telephone Company

A. The relationship between the hotels and the telephone company.

The Government's brief makes it clear that this case is submitted by it on the basis that the relationship between the hotels and the telephone company is that of subscriber or patron and carrier. The Communications Commission in its report (R. 28), in searching for a ground for its claim of jurisdiction over the service charges of the hotels and of the application thereto of the Communications Act of 1934, as amended, suggested (R. 28) that there were three possible relationships which might exist between the hotels and the telephone company: (1) that the hotels were agents of the telephone company; (2) that they were connecting carriers; and (3) that the hotels were subscribers or patrons of the telephone company's service. The Commission expressly disclaimed any finding that the hotels were connecting carriers (R. 30). It found that they were agents of the telephone company (R. 29). It concluded, however, that its views would be met if the telephone company should file a tariff schedule in terms compatible only with a carrier-subscriber relationship (R. 30).

The lower court rejected the idea of agency and found that the hotels were subscribers to the telephone company's service (R. 52, 63). No error has been assigned to that finding. The Government, in its brief, now states (p. 28):

> "No contention is made in this case that appellants are 'connecting carriers' within the meaning of the Act; and we accept for present purposes the finding of the court below (R. 63) that in extending interstate and foreign telephone service to their guests they are not acting as the agents of the telephone companies."

The position of the telephone company is similar (*Br. 3*).

The question here, therefore, is whether, when the relationship is that of carrier and subscriber, a tariff schedule by which the carrier attempts to impose on the subscriber a condition such as that involved here, is a schedule required by Section 203(a) to be filed with the Commission, is valid and may be enforced in an action under Section 401.

B. **Since the hotels are subscribers and perform their services as such and not as connecting carriers nor as agents of the telephone company, the Government's argument that such services may in part come within the statutory definition of "wire communication" does not establish the validity and enforceability of the tariff schedule.**

The Government (Br. 9-10, 14-15) maintains that the services which the hotels render to their guests and for which their service charges are made, are, at least in part, embraced within the statutory definition of "wire communication" (Section 153). However, the Government fails to explain how activities which may otherwise satisfy that definition come within the terms of the Act if they are the activities, not of a carrier but of a subscriber which is not a common carrier.

A large industry may own locomotives and cars or may rent them from a railroad. It may have an extensive track layout over which it moves cars loaded with goods throughout its plant or even for long distances. Its facilities and activities may thus come within the definitions of "transportation" and "railroad" contained in the Interstate Commerce Act (Section 1(3)(a), 54 Stat. L. 899). But since the industry is not a common carrier, the fact that its activities and facilities satisfy the definitions of "transportation" and "railroad" does not bring them within the scope of transportation subject to that Act nor permit or require that any charges which the industry may make to its patrons may be controlled by tariff schedules filed with the Interstate Commerce Commission, *United States* v. *Am. Tin Plate Co.*, 301 U. S. 402 (1936); *Penna. R. Co.* v. *P. U. Comm'n*, 298 U. S. 170 (1936); *Pennsylvania R. Co.* v. *M. McGirr's Sons Co.* (C. C. A. 2d, 1922), 287 Fed. 334; certiorari denied 262 U. S. 743.

The situation here is similar. This is a suit to enjoin an alleged violation of Section 203 of the Communications Act (R. 4). The entire Act makes it plain that its provisions concerning "wire communication", and especially Section 203, relate to the furnishing of "wire communication" by a "common carrier". Only a "common carrier" is required by Section 203 to file tariff schedules, and only such a carrier is prohibited from engaging in "wire communication" unless a schedule is filed and published. Only a carrier is prohibited from charging, demanding or collecting a greater, less or different compensation for such communication than that shown in its tariffs. The statute measures the Commission's jurisdiction, and since it regulates wire communication only by a common carrier or connecting carrier, it cannot, no matter how broad the definition of "wire communication" may be, regulate wire communication by a hotel which is conceded by the Government's brief (p. 28) to be neither a common nor connecting carrier.

Moreover, if the service which the hotels provide were deemed to constitute "wire communication" within the application and for the purposes of the Act, this would mean that the telephone company could be required to provide the service now rendered by the hotels and any businesses having PBX installations, such as offices, stores or industrial plants. This follows from Section 201(a) of the Act, which provides that it shall be the duty of every common carrier engaged in interstate or foreign communication by wire to furnish "such communication service upon reasonable request therefor". Such a result would probably not be satisfactory to any of the parties before this Court, but it would be more satisfactory to the hotels than being obliged to supply the service without reimbursement.

The telephone company's brief brings even more clearly into focus the essential issue here. On page *3* of its brief, counsel for the telephone company state of the hotels

> "that they are not common carriers, that they are not agents of the telephone companies, and that their surcharges are charges for hotel services and not charges for wire communication under the provisions of the Communications Act."

The question, therefore, is whether, by a tariff filed with the Commission the telephone company may control the charges of hotels which are not carriers for hotel services which are not wire communication subject to the Act. We submit that the answer must be in the negative.

C. **The Government's appeal to policy does not sustain its position in the face of the language of the statute. Moreover, it is based upon unwarranted assumptions as to the purpose of the Communications Act and as to the administration of other regulatory statutes.**

On page 16 of the Government's brief, it is argued that if appellants' contention were sustained

> "effective regulation of interstate and foreign telephone rates would be substantially impaired."

It is then said

> "Under appellants' theory, the Commission could prescribe rates on long distance calls to and from the PBX board, but neither the Commission nor any other agency charged with the regulation of telephone rates could prevent any amount of additional charges being assessed against the guest making or receiving the call."

But there is nothing astounding in this. The plain fact is that Congress has not given the Commission power to regulate the charges of hotels, nor is there anything in the

provisions of the Communications Act which would indicate a policy of so doing. Whether regulation of the hotel charges by the Act is desirable or not, the fact is that Congress has not attempted to regulate charges for services other than those of carriers. As Mr. Justice CARDOZO said in *Penna. R. Co.* v. *P. U. Comm'n*, 298 U. S. 170 (1936), at page 177:

> "If the concept of transportation is in need of expansion, it is for the legislative department of the government to determine how great the change shall be."

The Government's argument goes to the point that it is the policy of the Act that those who avail themselves of the telephone company's services must be controlled in what they do in connection therewith. We submit that this is not so and that in any event the language of the statute rather than the views of the Commission as to what public policy requires must control.

The purpose of the Act is to regulate the charges to be collected and received by telephone companies. What the customers or subscribers of the telephone company, who pay its tariff rates, may then do is left to the control or regulation of other agencies or of economic forces. The failure of Congress to regulate what hotels may charge while regulating the charges of telephone companies is perfectly logical. Hotels are not monopolies. Their prices are regulated by competition. The report of the Commission in Docket No. 6255 (R. 26), the brief of the telephone company (*p. 9*), and, to a lesser extent, the brief of the United States (p. 16) treat the situation as though the hotels had complete control of access to the use of the telephone by guests. This is a fundamental error in their approach to the problem. The hotels do not control access to the telephone. All the guest has to do is to go to the coin box telephone or other public telephones installed in the hotels which are regulated by the Washington tariff (R. 222) which provides that hotels cannot make surcharges for telephone messages from instruments accessible to the

general public. In that event the guest can not be denied access to the telephone. While the court below and the Commission expressed fears that the hotels, if not regulated, could resell interstate and foreign telephone service at any price they chose, it would be difficult, if not impossible, to imagine a hotel management so stupid as to voluntarily irritate its guests by grossly excessive charges. The only effect of this would be to drive the guest to the use of another hotel, which is the last thing the hotels desire. Moreover, there is no evidence or claim of any abuses or overcharges by the hotels.

In these days it has become a part of the hotel facilities which guests expect, like bellboy and valet service, that they shall be able to make telephone calls from their hotel rooms, receive calls there and receive a certain amount and kind of message and secretarial services. If messages are not correctly taken, it is the hotel and not the telephone company which is blamed by guests. The hotels can provide this service to their guests *as a part of their hotel installation and facilities,* only by renting equipment from the telephone company, employing operators, subscribing for toll service and paying the telephone company's tariff rates. We submit that when they do the latter, the language and purpose of the Act are satisfied and that fulfillment of that purpose does not extend the application of the statute to cover the manner in which the hotels reimburse themselves, the services which they provide, or the charges which they make to their guests.

The Commission and the Government's brief in supporting its position have proceeded on the erroneous assumption that the objective of regulating the charges of common carriers is defeated unless the regulation is extended to the charges made by the patrons of the common carriers. This has not been the view which has governed the administration of the Interstate Commerce Act. We recall the example cited in our main brief of the freight forwarder who buys railroad transportation and then resells transportation, adding something for his services,

where it has been held that the forwarder's charges are not subject to control by tariffs filed with the Interstate Commerce Commission. *Acme Fast Freight* v. *United States,* 30 F. Supp. 968 (1940), 309 U. S. 638.

At page 17 of its brief, the Government refers to cases involving the regulation of hotel charges by public utility commissions in the past. These decisions are entirely irrelevant because they arose under other statutes and were based on the theory that the hotels were acting as agents for the carrier. (See pages 65 and 66 of appellants' main brief.) Moreover, the opinions in some of these cases indicate that they were influenced largely by notions of public policy, such as those advanced by the Government here. Whether or not this was warranted under the various statutes involved in those cases, it is plain here that the Commission and the courts may not add to the action of Congress.

D. The Government finds support for its argument only by adding words to the language of the statute.

In appellants' main brief the point was made that the tariff schedule is not one required by Section 203 to be filed and observed since it attempts to regulate the charges of the hotels, which are not carriers, and in no way specifies or affects the charges collected or received by the telephone company. We pointed out that under the provisions of Section 203 the only tariff schedules which a carrier is required to file are such as specify or affect the charges of the carrier "for itself and its connecting carriers".

The Government, in its brief, terms this reference to the language of the statute "pedantic" and "inelastic" (Br. 19).

The fact is, however, that rather than being a "pedantic" or "inelastic" interpretation of the Act, the interpretation presented by the hotels is the only construction of the words possible without introducing new language into the section. The Commission's brief seeks in effect to add to the simple, precise words of the statute

"charges for itself and its connecting carriers",—words which are perfectly plain in their meaning, the further words "and for hotels, apartment houses and clubs." It is utterly illogical to state that the words "charges for itself" mean charges by the hotels for themselves. The two final sentences of this argument (pp. 19-20) assert that Section 203(a) requires the inclusion in filed schedules of all charges for the service of a carrier and connecting carriers, whether exacted by the carrier itself or "by others with its knowledge and acquiescence." It is argued from this that the charges fall within Section 203 "regardless of whether the hotels in imposing the charges do so for their own benefit or as agents for the carriers." The statute does not so provide, either expressly or even by remote implication.

Moreover, these assertions assume that the hotels' charges are "for such carrier's service and the service of its connecting carriers." This is contrary to the fact and inconsistent with the balance of the Government's argument and that of the telephone company, which properly recognize that the charges are for the hotels' services, and that the hotels are entitled to reimburse themselves for these services. Thus the Government contends (Br. 22) that there is no effort on its part to control the hotel business. It concedes the right of the hotels to recover

> "such expenses, secretarial or otherwise, as they may incur in making available to their guests the telephone companies' interstate and foreign telephone service."

It says that

> "* * * Such expenses may be recovered in any lawful manner which appeals to the business judgment of the hotels' managers. Whether the recovery is by means of increased room rates, by flat service charges on each guest, by fixed fees for each service rendered, are matters beyond the reach of the regulation and beyond the concern of the Commission."

We have demonstrated in our main brief the inequity of these methods suggested by the Commission. If the room

rates were increased, some guests who never use the telephone would be forced to bear a part of the expense attributable to those who use it extensively. Flat service charges to each guest and fixed fees for each service rendered would not be uniform, if uniformity is necessary, and would be just as contrary as the present charges to the tariff schedule here in issue, providing that

> "the use of the service by guests * * * shall not be made subject to any charge * * * in addition to the message toll charges of the Telephone Company as set forth in this tariff." (Tariff, R. 9, 38.)

The Government concedes that there is no objection from the standpoint of public policy to the hotels' reimbursing themselves for the services they render. Thus the case against the hotels is resolved into objection to the "manner which appeals to the business judgment of the hotels' managers" as the fairest way of obtaining reimbursement for their costs and compensation for their services.

It is submitted that without writing new language into the statute its provisions cannot be extended to apply to the method which a subscriber adopts to reimburse itself for the expense of services outside the scope of the Act.

E. Since the hotels' charges are for hotel services and not for wire communication subject to the Act, the attempt to control them by tariff and to enforce compliance therewith by an action under the Act cannot be defended on the ground that the schedule is valid regulation of the telephone company's charges or services.

Despite the fact that the amount which the telephone company receives for a toll charge is neither increased, decreased nor affected in any way by the tariff schedule here in issue, both the Government (Br. 20-21) and the telephone company (*Br. 6-8*) attempt to defend the schedule as a regulation in some way affecting the telephone company. None of the reasons given, however, brings the

regulation within the language of the statute as specifying or constituting a classification, practice or regulation affecting the *charges* of the telephone company "for itself and its connecting carriers", nor as a specification of charges for wire communication by a carrier subject to the Act.

The Government argues that the regulation is one "specifically affecting the telephone companies' own service" (Br. 20). But while this argument might lend support for the schedule if the Communications Act contained the much broader language found in Section 6 of the Interstate Commerce Act, providing that tariffs of railroads shall show not only charges but also "all privileges or facilities granted * * * and any rules or regulations which in any way * * * affect * * * the value of the service rendered", the argument does not have force under the language of the present statute, which clearly confines the concern of Congress to regulations affecting "charges" of the telephone company.

The telephone company defends the regulation on the ground that it "affects the telephone companies in their business." The argument is that if the hotels made too high a charge this would deter the hotel guests from using the telephones in their rooms. An equal deterrent would be provided, however, if the hotels so increased their room rates as to discourage patronage or if they made a flat fee or service charge, all of which the Government concedes to be proper. The reference in Section 203 to regulations "affecting such charges" certainly does not mean regulations affecting the volume of business done by the telephone company, but rather, the exact charges made for individual telephone calls.

The Government asserts further (Br. 20), that regulations "defining the rights, privileges and restrictions attaching to a particular type of service offered, are a commonplace of telephone tariffs * * * and form as proper a part of the tariff as does the schedule of charges itself." No analogy is furnished by the regulation of The Chesapeake and Potomac Telephone Company prohibiting hotels from making service charges "for messages from instruments 'accessible to the general public or to guests, tenants or members generally' ". That tariff involves only telephones accessible to the public. This case does not concern telephones accessible to the public. It relates to services and facilities provided by the hotels only for their guests. In our main brief we pointed out that it was conceivable that the telephone company might properly make certain regulations for the purpose of protecting its equipment, facilities and service. However, as we said, it does not follow that a regulation which is proper in this sense and which may give the carrier certain rights in relation to its subscribers, may be enforced by the Government in an action under Section 401, or that failure to observe such regulations, even if published in a tariff, would constitute a violation of Section 203. It is only where a regulation affects the charges collected by the telephone company that failure to comply constitutes a violation of Section 203.

The telephone company cites two cases at page 8 of its brief—*1015 Chestnut Street Corp.* v. *Bell Telephone Co. of Pennsylvania*, PUR 1931A, 19, 7 PUR (NS) 184 (1930, 1934); *Budd* v. *Southwestern Bell Telephone Co.*, 28 PUR (NS) 235 (Mo. P. S. C., 1939), as support for its argument that regulation of the kind here in issue has been sustained by the State Commissions. The fact is, however, that in the decisions themselves the Commissions held that the factual situations offered no analogy to the situation with reference to regulating PBX telephone service to hotels. Moreover, the regulations referred to by the Commission and the telephone company are not similar in character to the regulation here in issue. For example, the telephone company's brief (*p. 8*) refers to a regulation which it states affects the subscribers in their business. The regulation referred to is one which limits the use of the telephone to the subscriber, his agents and representatives. However, that regulation appears only to apply

"where the service is on an unlimited flat rate basis" (R. 220). It is obvious that such a limitation would affect the charge for unlimited flat rate service, but the validity of such a limitation affords no analogy to a case involving a message rate. Furthermore, it is significant that no decision is cited holding that failure to observe the regulations referred to constitutes a violation of Section 203. We refer to the discussion at pages 28, 43, 48-54 of appellants' main brief.

F. This Court is not bound to accept the administrative action of the Commission as suggested by the Government.

The Government (Br. 23) seeks to distinguish the cases of *United States* v. *Am. Tin Plate Co.*, 301 U. S. 402; *Swift & Co.* v. *United States*, 316 U. S. 216; and *Acme Fast Freight* v. *United States*, 30 F. Supp. 968 (S. D. N. Y.), on the ground that they refer to matters before the Interstate Commerce Commission. Its plea that

> "there is obviously no such identity in the conditions and problems of the two industries as to call for the indiscriminate application of decisions in one field to cases arising in the other"

is obviously inconsistent with its own citation of the *Tin Plate Co.* case and other railroad cases later in its own brief (pp. 29, 31).

The Government then suggests (Br. 23) that consistently with "The deference shown by this Court" to the prior "factual determinations by the Interstate Commerce Commission", the Court here should not disregard "the comparable factual determination of the Federal Communications Commission in its specialized sphere."

There are several answers to this suggestion.

In the first place, the Government concedes (Br. 30) that the hotels are neither agents nor connecting carriers. This eliminates the necessity for a "factual determination" by

the Commission, and is indeed a rejection by the Government of the determination which the Commission made.

In the second place, this case involves a question of jurisdiction over the hotels as subscribers and in no other capacity. This is a question of law which depends solely on the interpretation of Section 203 of the Act and only upon the meaning of a few words of that section. Subdivision (a) of that section provides that every common carrier shall file schedules showing all charges for itself and its connecting carriers,

> "and showing the classifications, practices, and regulations affecting such charges."

There is no complex or intricate state of disputed facts to be submitted to an administrative body familiar with the practices involved. As the Government puts it (Br. 7) "there is no substantial dispute in the evidence."

G. The so-called submetering cases are distinguishable.

Both the Government (Br. 18) and the telephone company (*Br. 8*) *cite Lewis* v. *Potomac Electric Power Company*, 64 F. (2d) 701, and various other cases commonly called the submetering cases, having to do with the resale of electric current. In the *Lewis* case it was held that the Electric Power Company could refuse to sell current to an office building for resale by the latter to its tenants at higher rates than paid to the power company. The decision rested upon the court's view that a power company could refuse to furnish current for resale. In some of the submetering cases, for example, *Florida Power & Light Co.* v. *State*, 107 Fla. 317 (1932), the right of the power company to refuse to sell current to one intending to submeter and resell it was upheld upon the ground that the submetering buyer would become a competitor of the power company, which had the right to protect itself against such competition. Obviously, no such situation is present here. The telephone company furnishes telephone service to the hotels with express permission to make it available to their guests.

Moreover, it does not appear in the submetering cases that the office buildings or apartment houses rendered any services of their own or did more than resell the electric current supplied by the utility at higher rates than those paid by them.

The hotels obtain the telephone company's service for their guests at the exact charges paid by the hotels in accordance with the telephone company's tariff rates, but, even more important, they provide additional services. Their service charges do not represent a profit from the resale of the telephone company's service, but, instead are compensation for the additional services rendered by the hotels and reimbursement to them for their expense therefor. Apart from the decision below and that below in the New York case (No. 823), we know of no decision in which it has been held that one who has himself performed services and incurred expense in the course of his own business, in making the services of a common carrier available to his own customers, is precluded from charging for his services and reimbursing himself for his expense. Certainly this has not been held with respect to freight forwarders, who stand in the relation of shippers to railroads and make railroad transportation available to their patrons by adding their own services of assembling and loading.

Finally, the submetering cases present an entirely different problem from that which is here before the Court, since in the submetering cases the power companies sought to deal directly with the individual consumers and the question involved was the right of a power company to refuse to sell current to a middleman when the power company did not wish to do so because it would thereby be prevented from dealing directly with the ultimate consumers. As the court said in the *Florida Power & Light Company* case (pp. 322-323), cited on page 8 of the telephone company's brief and on page 18 of the Government's brief:

> "A public utility company's right to fix its own rates also includes the right to so prescribe and enforce them that all the company's dealings will be with the real purchasers and users of its service, without submitting to the requirement of delivering its service through the medium of a third party over which the company would have no control."

It is not claimed by the telephone company here that it desires to have direct dealings with hotel guests and that the regulation involved is not designed to accomplish this result. It would obviously be utterly impossible for it to do so because the hotel guests are for the most part transients. The telephone company's service is available to guests only because the hotels have procured the necessary facilities and employees and because they arrange in each instance for the placement of calls for their guests. Under these circumstances the telephone company cannot assert that the regulation here in issue is justified on the principle supporting the regulations involved in the submetering cases.

The last two cases cited by the Government (Br. 18) in connection with submetering do not deal with that subject. The *Rogers* case said a business corporation could not sell surplus power which it generated for its own use, and the *New York Edison Company* case said that a business corporation which produced its own power and resold it to tenants could not compel the Edison Company to provide breakdown service for the tenants.

H. **In the absence of a finding that the telephone company violated the statute and of an injunction against it, it was error to find a violation by the hotels and to enjoin them.**

In our main brief, we urged that the prohibitions of Section 203 are directed only to common carriers and that unless there is a violation by the telephone company, no violation can be found to exist. We also urged that in view of

the language of Section 411, no decree could be issued against the hotels as subscribers unless there was a decree against the telephone company.

The Government took no appeal from the refusal of the lower court to enter a decree against the telephone company; it assigned no error to the finding of the lower court that "the telephone companies are not violating the tariff schedules at all" (R. 54); nor to the lower court's failure to find and conclude that there was any violation of Section 203 on the part of the telephone company. It is submitted that under these circumstances the Government is bound by the action of the lower court and may not properly now urge, as it does (Br. 34, 35), that the "finding that the telephone companies were not violating the regulation" is an "error of law which may and should be corrected by this Court", or that this Court should dispose of this case as though the lower court had found a violation by the telephone company and entered a decree against it. *Bolles* v. *Outing Company*, 175 U. S. 262 (1899); *Guardian Savings & Trust Co.* v. *Dillard* (C. C. A., 8th, 1926), 15 F. (2d) 996; *Morley Construction Co. et al.* v. *Maryland Casualty Co.*, 300 U. S. 185 (1937); rehearing denied 300 U. S. 687, 302 U. S. 779.

The last four decisions cited by the Government on page 35 of its brief do not support its position here. True they hold, as stated, that if a judgment below is proper on correct principles, it may stand regardless of an erroneous conclusion of law by the lower court. It does not follow, however, that if a finding of fact that the telephone company was violating Section 203 is necessary to support an injunction and no such finding was made by the lower court, this Court may dispose of the appeal on the assumption that there was such a finding. Neither does it follow that if our contention is correct that there may be no decree against the hotels except to the extent that a decree is entered against the telephone company, this Court may proceed upon the assumption that there was such a decree when none was entered by the lower court and no appeal was taken from its action. The Government's contention vio-

lates the principle stated in *Morley Construction Co. et al.* v. *Maryland Casualty Co., supra* (p. 191) that:

> "What he [an appellee] may not do in the absence of a cross-appeal is to 'attack the decree with a view either to enlarging his own rights thereunder or of lessening the rights of his adversary, whether what he seeks is to correct an error or to supplement the decree with respect to a matter not dealt with below.' *Ibid.* The rule is inveterate and certain."

Respectfully submitted,

PARKER MCCOLLESTER,
GEORGE DEFOREST LORD,
JOSEPH W. WYATT,
Attorneys for Appellants.

March 8, 1945.

AND
TIONAL COMPANY

TABLE OF CONTENTS.

CASES CITED.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

AMBASSADOR, INC., *et al.*, *Appellants*, *v.* THE UNITED STATES OF AMERICA, AMERICAN TELEPHONE & TELEGRAPH COMPANY, and THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANY, *Appellees.*	No. 446.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA.

BRIEF IN BEHALF OF AMERICAN TELEPHONE AND TELEGRAPH COMPANY AND THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANY.

OPINION BELOW.

The opinion of the Court below appears in the record at pages 50-55. It has not been officially reported.

JURISDICTION.

The appellants invoked the jurisdiction of this Court under the provisions of the Expediting Act approved February 11, 1903, as amended, 15 U. S. C., Section 29, 49 U. S. C., Section 45, and Section 238(1) of the Judicial

Code, as amended, 28 U. S. C. 345, as extended by Section 401(d) of the Communications Act of 1934, as amended, 47 U. S. C., Section 401(d).

STATEMENT.

This brief is filed on behalf of the American Telephone and Telegraph Company and The Chesapeake and Potomac Telephone Company, appellees. (It will be convenient to speak of them as the telephone companies or, with respect to the service they join in furnishing, simply as the telephone company.) In the District Court the Government sought an injunction against the telephone companies as well as against the hotels to restrain violation of the tariff in issue. The reason advanced by the Government for an injunction against the telephone companies was that they had continued to render service to hotels which were making surcharges on interstate and foreign toll calls of their guests in violation of the tariff. The District Court held that this did not constitute a violation of the tariff on the part of the telephone companies and denied an injunction against them, but retained jurisdiction to enjoin them from rendering service to hotels which might thereafter violate the injunction granted against the hotels, if that should become necessary to effectuate the court's decision (R. 55, 69). There has been no appeal from the denial of an injunction against the telephone companies, but the hotels have appealed from the injunction against them.

It is the position of the telephone companies here, as it was below, that the tariff provision in question is valid and should be enforced. It is also their position that the District Court correctly decided that no injunction should be awarded against the telephone companies.

We take no issue with the statement of facts in the brief for the appellants (whom we shall call the hotels) except in so far as they claim to be "procuring" equipment from the telephone company, paying the telephone company for that equipment and then "furnishing" telephone facilities so procured to their guests (Brief, pp. 7, 8, 52). This is a misconception. The equipment in the hotels is the property of the telephone company, installed and maintained by it as an integral part of its own plant. It is not rented to the hotels, although some part of the charges for service furnished under local tariffs is computed in terms of the equipment installed. What the company furnishes and charges for is telephone service. The service subscribed for by the hotels is available for use both by the management of the hotels and by the guests.

The material differences between the hotels and the telephone companies relate, however, not to matters of fact but to the nature of the tariff and its legal effect. This brief will be addressed to those differences and the facts will not be restated except where necessary to make our position clear.

To clear the ground, let us say at once that we agree with the position of the hotels thus far,—that they are not common carriers, that they are not agents of the telephone companies, and that their surcharges are charges for hotel services and not charges for wire communication under the provisions of the Communications Act. With these points behind us, a brief examination of the nature of the tariff provision should dispose of the controlling issue in the case.

ARGUMENT.

I.

The Tariff is a Valid Regulation stating a Condition upon which Telephone Service is Furnished to Hotel Subscribers, and not a Publication of Charges for Hotel Services or an Illegal Interference in the Hotels' Business.

Section 203(a) of the Communications Act requires common carriers to file tariffs showing their charges for telephone communication, and the classifications, practices and regulation affecting such charges.* The hotels contend in their brief (pp. 32-35) that the tariff provision in issue is not validly filed pursuant to that section, but is instead an unauthorized attempt of the telephone companies to publish for the hotels, which are not common carriers, charges collected by the hotels for hotel services, which are not communication service under the Act. Accordingly, it is argued that a violation of the tariff provision does not constitute violation of Section 203(a), and the suit, which is predicated on that theory, must fail.

The tariff will not bear the construction the hotels seek to place upon it. It was filed by the telephone companies in compliance with the report and order of the Federal Communications Commission in its investigation of hotel surcharges in the District of Columbia, its Docket 6255 (R. 14), which required the telephone companies either to file in their tariffs schedules of the charges to be collected by hotels or to deal with the matter by filing a regulation prescribing the conditions upon which the service is furnished (R. 37). The telephone companies chose the latter

* Subsections (a), (b) and (c) of Section 203 of the Act are printed as an appendix to this brief.

course and filed the tariff regulation in issue (R. 38), which reads as follows:

> "Message toll telephone service is furnished to hotels, apartment houses and clubs upon the condition that use of the service by guests, tenants, members or others shall not be made subject to any charge by any hotel, apartment house or club in addition to the message toll charges of the Telephone Company as set forth in this tariff."

As the choice of the alternatives required, this regulation is the antithesis of a schedule of hotel surcharges. It deals with the hotel as a subscriber, not a connecting carrier, and requires it as a subscriber to comply with a specified condition in order to receive service. It does not fix any amount (or zero) as what a hotel may charge for hotel service or any thing else; it only prohibits a method of collecting such charges by imposing them on the use of the telephone service. It plainly means that a guest shall not be required to pay any additional charge, or surcharge (regardless of what it is for) as the *result* of having used the telephone service for which the hotel subscribes. It does not mean that the hotels may charge only so much for their hotel services in connection with toll calls, or, as the hotels contend, prevent them from seeking reimbursement of their expenses from their guests in some form, as, for example, by increasing room charges. Any method of reimbursement under which imposition of the charge is not dependent on the use of the telephone service is permissible.

The hotels do not rest their case on their construction of the tariff provision as a schedule of hotel charges. They contend further (Brief, pp. 46-55) that it is invalid as a regulation of the use of the service for two reasons:—

first, it is not the kind of regulation authorized or permitted by Section 203(a), and, second, it is in substance an arbitrary and capricious regulation of the hotel business beyond the power of the telephone companies to impose or the Commission to prescribe.

The first contention is briefly that the regulations specified in Section 203(a) are those "affecting" the carrier's charges; the regulation prohibiting hotel surcharges does not "affect" the amount of the telephone company's charges; consequently a violation of the regulation will not support a suit based on Section 203(a) (Brief, pp. 46, 47). The argument is highly technical and requires a construction of the statute too narrow to be tenable. It concentrates attention upon a few words of Section 203(a) and ignores the broad regulatory purposes expressed in this part of the Act. It also ignores the reference in Section 203(c) to the "privileges" which are permitted to be extended only "as specified in such schedule."* But upon a proper construction even the language of Section 203(a) upon which the hotels rely does not sustain their position.

The charges which Section 203(a) requires the carriers to publish in their tariffs are not mere amounts of money. They are charges for communication service and are not complete or intelligible unless, along with the amounts to be paid, there is a statement of what the payments are for. In order to file the charges for toll service furnished to hotel subscribers, this service must be sufficiently described in the tariffs to inform the public and the Commission of what the hotel subscribers get for their money. The regulation which prohibits hotels from imposing surcharges on

* See the text of this subsection in the appendix.

toll calls made by guests is a proper element in the description of the service because it is a limitation on the use that may be made of the service. It prevents the hotels from using the service as a means of collecting their charges for hotel service. The regulation consequently was properly filed even under the narrow wording of Section 203(a).

In their second argument against the validity of the tariff regulation (Brief, pp. 48-55), the hotels concede (Brief, p. 48) that a carrier may attach reasonable conditions to the furnishing of its service, but contend that this regulation so obviously transcends all possible bounds of reasonableness that it is invalid. Since the hotels admit that the determination of reasonableness is for the Commission in the first instance, and have a complaint raising that issue now pending before the Commission, their argument here must be that action of the Commission prescribing or approving the regulation would be so arbitrary and capricious as to be void.

The hotels suggest as a test of the validity of a regulation that it shall "affect the telephone companies in their business, and not the subscribers in theirs" (Brief, p. 49). The regulation in issue clearly meets the first half of this test, for it obviously affects the telephone companies in their business. Under the terms of this regulation a guest at the Shoreham Hotel upon making a long distance call has to pay the telephone company's tariff charge plus the federal tax. Without the regulation, upon making the same call, he would have to pay the tariff charge, the tax and perhaps as much as three dollars more. Whether the user has to pay that extra three dollars directly affects the business of the telephone company. Such additional charges are necessarily a deterrent to the use of the service and a

disturbing element in the relations of the telephone companies with the public. The investigation of the Commission in Docket 6255 (See R. 15, footnote) following a succession of court and commission cases, is sufficient evidence that hotel surcharges have been a continuing problem to the telephone industry and a continuing source of complaints to the regulatory authorities.

The second half of the test, *i.e.*, that the regulation must not affect the subscribers in their business, is obviously unsound. Regulations frequently restrict or "affect" the use which the subscriber can make of the service. If the subscriber uses the service in his business, then to that extent the regulation "affects" the subscriber's business. An example is the type of regulation which restricts the use of business service to the subscriber, his agents and representatives (*Cf.* R. 220). This prevents a tradesman from allowing his customers to use his telephone service and clearly "affects" the tradesman's business. Such regulations have nevertheless been sustained. *1015 Chestnut Street Corp.* v. *Bell Telephone Co. of Pennsylvania*, PUR 1931A, 19, 7 PUR (NS) 184 (1930, 1934); *Budd* v. *Southwestern Bell Telephone Co.*, 28 PUR (NS) 235 (Mo. P. S. C., 1939). Regulations of electric utilities which prohibit submetering or resale of public utility service obviously affect the business of the consumers but have not been condemned on that account. *Lewis* v. *Potomac Electric Power Co.*, 64 F. 2d 701 (App. D. C.); *Florida Power & Light Co.* v. *State*, 107 Fla. 217, 144 So. 657 (1932); *Sixty-Seven South Munn Inc.* v. *Board of Public Util. Com.*, 106 N. J. Law 45, 147 Atl. 735 (Sup. Ct. 1929) affd. 107 N. J. Law 386, 152 Atl. 920 (Court of Errors and Appeals, 1930), cert. den. 283 U. S. 828.

The surcharges at which the present regulation is directed are collected only when the toll service of the

telephone company is used. The amount of the surcharge is graduated according to the extent to which that service is used as reflected in the tariff charge of the telephone company, not according to how much hotel service is furnished in connection with the call. Thus, the regulation here in issue has a direct relation to the use of the telephone service and does not seek to regulate practices of the hotel except in that relationship. It removes a source of difficulty in the use of the telephone company's service by hotel guests, and goes no further than necessary to accomplish its purpose of keeping that service free from "toll gate" charges. The interest of the public and the telephone companies in preventing the hotels from imposing "toll gate" charges on access to telephone service has been pointed out. It simply cannot be said that a regulation to accomplish that result so transcends all bounds of reasonableness that it could not possibly be sustained by the regulatory authority and must therefore be stricken down by the Court as arbitrary and capricious.

II.

Injunction against the Telephone Companies was Properly Denied.

Counsel for the Commission contended below (R. 205, 206) that the telephone companies violated the tariff in at least a technical sense by continuing to render service to hotels which were making surcharges. The District Court held that the telephone companies had not violated the tariff and denied an injunction against them (R. 54). A brief review of this aspect of the case will show that the action of the District Court was correct.

The practice of the Washington hotels of imposing surcharges on toll calls was of long standing (R. 159). The regulation prohibiting surcharges was published and filed January 22, 1944 to become effective on February 15, 1944 (R. 121, 282). This constituted legal notice, but the telephone companies nevertheless brought the regulation directly to the attention of the hotels and endeavored to persuade them to comply with it (R. 121-126). These efforts were being continued when this suit was brought by the Government on February 19, 1944 (R. 2), four days after the tariff became effective. An interlocutory injunction under which the telephone companies would have been compelled to cut off service to the hotels was sought (R. 10). The hotels on their part brought suit in the District Court for the District of Columbia to set aside the order of the Commission pursuant to which the tariff was filed, and that suit is still pending (R. 67). Thus, since four days after it became effective, the validity of the tariff has been sharply contested and is now before this Court for final determination.

The telephone companies believe that the tariff is valid and must be complied with. As in the case of other regulations applicable to subscribers, compliance may be secured in various ways, as, for example, by explanation and persuasion, by litigation or by cutting off service. Statement of the regulation as a condition upon which service is rendered puts the hotels on notice that the latter, and most drastic, means of securing compliance may be used. It does not mean that it is the only means of securing compliance available to the telephone companies. In this case, the telephone companies did all in their power to secure compliance with the tariff by explanation and persuasion. While so

engaged, of course they did not start any litigation or cut off service. Within four days after the tariff became effective, and before the companies had completed their efforts to bring about compliance, the Government started this suit. Under the circumstances, the telephone companies can not be held to have violated the tariff, and an injunction against them was properly denied.

CONCLUSION.

It is respectfully submitted that the judgment of the District Court should be affirmed.

T. Brooke Price,
Spencer Gordon,
John T. Quisenberry,
Attorneys for American Telephone and Telegraph Company and The Chesapeake and Potomac Telephone Company, Appellees.

John H. Ray,
R. A. Van Orsdel,
Of Counsel.

February 27, 1945.

APPENDIX.

The Communications Act of 1934, 48 Stat. 1064 (U. S. C., Title 47, Secs. 151 *et seq.*), provides *inter alia:*

"Sec. 203. (a) Every common carrier, except connecting carriers, shall, within such reasonable time as the Commission shall designate, file with the Commission and print and keep open for public inspection schedules showing all charges for itself and its connecting carriers for interstate and foreign wire or radio communication between the different points on its own system, and between points on its own system and points on the system of its connecting carriers or points on the system of any other carrier subject to this Act when a through route has been established, whether such charges are joint or separate, and showing the classifications, practices, and regulations affecting such charges. Such schedules shall contain such other information, and be printed in such form, and be posted and kept open for public inspection in such places, as the Commission may by regulation require, and each such schedule shall give notice of its effective date; and such common carrier shall furnish such schedules to each of its connecting carriers, and such connecting carriers shall keep such schedules open for inspection in such public places as the Commission may require.

"(b) No change shall be made in the charges, classifications, regulations, or practices which have been so filed and published except after thirty days' notice to the Commission and to the public, which shall be published in such form and contain such information as the Commission may by regulations prescribe; but the Commission may, in its discretion and for good cause shown, modify the requirements made by or under authority of this section in par-

ticular instances or by a general order applicable to special circumstances or conditions.

"(c) No carrier, unless otherwise provided by or under authority of this Act, shall engage or participate in such communication unless schedules have been filed and published in accordance with the provisions of this Act and with the regulations made thereunder; and no carrier shall (1) charge, demand, collect, or receive a greater or less or different compensation for such communication, or for any service in connection therewith, between the points named in any such schedule than the charges specified in the schedule then in effect, or (2) refund or remit by any means or device any portion of the charges so specified, or (3) extend to any person any privileges or facilities in such communication, or employ or enforce any classifications, regulations, or practices affecting such charges, except as specified in such schedule."

INDEX

CITATIONS

Cases:

In the Supreme Court of the United States

OCTOBER TERM, 1944

No. 446

AMBASSADOR, INC., WASHINGTON-ANNAPOLIS HOTEL COMPANY, DAVID A. BAER AND ROBERT O. SCHOLZ, A PARTNERSHIP, ET AL., APPELLANTS,

v.

UNITED STATES OF AMERICA, AMERICAN TELEPHONE & TELEGRAPH COMPANY, ET AL.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court below was rendered orally, and is not reported. It appears in the record at pages 50–55.

JURISDICTION

The decision of the court below was announced on April 27, 1944, and its Findings of Fact, Conclusions of Law and Order for Permanent Injunction were entered on June 8, 1944 (R. 50–69). The